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STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
CORPORATION TAX BUREAU  
REVIEW, INTERPRETATION AND INSTRUCTION UNIT

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In the Matter of the Applications and Petition of	:	
	:	
<u>AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.</u>	:	
	:	Hearing Case
for revision of franchise taxes under Article	:	No. 203
9-A of the Tax Law for the calendar years	:	
1962 and 1963 and for redetermination of	:	
deficiency of tax for the calendar year 1964.	:	

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Based on a Report of Examination by our New York Office, notices of assessment for the years 1962 and 1963 and notice of deficiency for the year 1964 were issued April 15, 1969, disallowing as a deduction a portion of the interest expense on the basis that it was attributable to subsidiary capital. Following conferences and correspondence with the taxpayer, the file was referred back to the New York Office to permit the examiner to verify his figures in the light of the taxpayer's arguments.

As a result of information which had not previously been made available to the examiner, the amount of interest attributable to subsidiary capital was recomputed as follows:

	<u>1962</u>	<u>1963</u>	<u>1964</u>
Previously disallowed	\$1,254,871.00	\$1,103,046.00	\$930,598.00
Revised disallowance	<u>651,210.00</u>	<u>579,709.00</u>	<u>504,435.00</u>
Reduction	603,661.00	523,337.00	426,163.00
Allocation percentage	40.9593	41.4176	41.7336
Allocated amount	247,255.00	216,754.00	177,853.00
Tax reduction at 5½%	\$ 13,599.05	\$ 11,921.45	\$ 9,781.92

This revised disallowance has been agreed to by the taxpayer. It is recommended that the taxes be recomputed as shown above.

/s/ E. J. Scully  
\_\_\_\_\_  
Principal Corp. Tax Examiner

/s/ J. J. Genevich  
\_\_\_\_\_  
Principal Corp. Tax Examiner

EJS:MB  
5/15/70

Approved: /s/ E. A. Doran  
          /s/ A. B. Manley - 6/2/70  
          /s/ Milton Koerner - 5/20/70  
          /s/ Norman Gallman - 6/11/70

## DEPARTMENT OF TAXATION AND FINANCE

## MEMORANDUM

*Corp. Tax Letter*

TO: Mr. Rook  
FROM: Mr. Doran  
SUBJECT: American Can Company

OFFICE Corporation Tax

DATE February 18, 1970

Transmitted herewith is the hearing file and a proposed determination in the above matter covering the calendar year 1962.

After your review, please forward the file to the Tax Commission for consideration.

  
Director

STATE OF NEW YORK

THE STATE TAX COMMISSION

- - - - -  
In the Matter of the Application

of

AMERICAN CAN COMPANY

for revision or refund of franchise  
tax under Article 9-A of the Tax Law  
for the year 1962  
- - - - -

American Can Company, having filed an applica-  
tion for revision or refund of franchise tax under Article  
9-A of the Tax Law for the year 1962, and the facts having  
been agreed to by Stipulation of Facts dated October 25,  
1967, executed by Edward H. Best, Counsel and Deputy Tax  
Commissioner of the State Tax Commission, and by Harry G.  
Mason, General Tax Attorney, for the taxpayer, and the  
parties having waived the right to present any further  
testimony at a formal hearing under Section 214 of the Tax  
Law,

Upon all the stipulated facts herein and upon the  
entire record, it is hereby found:

(1) The taxpayer, American Can Company, a New  
Jersey corporation doing business in the State of New York,  
is engaged in the manufacture and sale of containers. The  
taxpayer has a permanent or continuous place of business in  
New York, N.Y., where its principal office is located.

(2) The taxpayer filed a franchise tax return  
for the year 1962, claiming a net operating loss deduction  
in the amount of \$9,825,054.20. Such net operating loss  
deduction was disallowed by the Corporation Tax Bureau for  
the reason that the loss had been incurred by A. W. Glass  
Corporation, a former New Jersey subsidiary merged by the

taxpayer on October 14, 1962 which had never been held subject to the tax imposed by Article 9-A. The pertinent provisions of Section 208.9(f) of the statute are as follows:

"A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of internal revenue code of nineteen hundred fifty-four, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that \* \* \* (2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article, \* \* \*."

(3) On March 23, 1964, after being notified of the disallowance of the net operating loss deduction, the taxpayer filed franchise tax returns on behalf of A. W. Glass Corporation covering the years ended December 31, 1960 and 1961 and the period from January 1, 1962 to October 14, 1962, the date of merger. On the basis of a field audit, the Corporation Tax Bureau held that A. W. Glass Corporation was not subject to the New York State franchise tax during the period from June 23, 1960, the date of its incorporation, to August 24, 1962 because its activities in New York during that period were limited to the operation of a sales office soliciting orders which were accepted and filled at the office of A. W. Glass Corporation in New Jersey. Section 1.6 of the Ruling of the State Tax Commission dated March 14, 1962 reads, in part, as follows:

"Example 1: A foreign manufacturing corporation has its factory outside New York. Its only activity in New York is the solicitation of orders for its products through traveling salesman or a sales office. The orders are forwarded to its home office outside the state for acceptance and the merchandise is shipped by common carrier from the factory direct to the purchasers. The corporation is not subject to the New York franchise tax, because its sole activities in New York are in interstate commerce."

(4) A. W. Glass Corporation was held taxable during the period from August 25, 1962 to October 14, 1962 because it maintained inventories in a public warehouse in New York State in addition to the operation of a sales solicitation office. During that period the corporation incurred a loss of \$825,039. Section 1.6 of the Ruling of the State Tax Commission dated March 14, 1962 reads, in part, as follows:

"Example 2: A foreign corporation is engaged in the business of manufacturing. Its factory is located outside New York but it maintains a stock of merchandise in New York. Orders are filled from its New York stock. The corporation is subject to the New York franchise tax."

Based upon the foregoing, the State Tax Commission hereby

**DETERMINES:**

(A) That A. W. Glass Corporation was not subject to the New York State franchise tax during the period from June 23, 1960 to August 24, 1962:

(B) That A. W. Glass Corporation was subject to the New York State franchise tax during the period from August 25, 1962 to October 14, 1962, during which period it incurred a net operating loss of \$825,039.

(C) That such loss is deductible in computing the entire net income of American Can Company for the year 1962.

(D) That losses incurred by A. W. Glass Corporation during periods when it was not subject to the New York State franchise tax are not deductible in computing its own entire net income or that of any successor corporation for any subsequent period.

(E) That in computing the wage allocation percentage for the year 1962, the taxpayer erroneously included pensions paid to retired employees in both the numerator and denominator, resulting in an overstatement of the business allocation percentage.

(F) That the tax is resettled as follows:

Entire net income before net operating loss deduction	\$57,099,633.79
Less net operating loss deduction	825,039.00
Adjusted entire net income	56,274,594.79
Adjusted business allocation percentage	9.326869%
Allocated entire net income	5,248,657.74
Tax at 5½%	288,676.18
Subsidiary capital tax	41.92
Total tax	\$ 288,718.10

(G) That the resettled tax does not include taxes or other charges which are not legally due.

Dated: Albany, New York

this 9th day of March, 1970.

THE STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

Copy

STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
CORPORATION TAX BUREAU  
REVIEW, INTERPRETATION AND INSTRUCTIONS UNIT

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In the Matter of the Petition  
of  
CLAY-ADAMS, INC.  
for redetermination of deficiency  
of franchise tax under Article 9-A  
of the Tax Law for the fiscal years  
ended September 30, 1965 and  
September 30, 1966.

Petition No. 160

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The taxpayer filed reports for the periods ended September 30, 1965 and 1966 on April 14, 1966 and May 9, 1967, respectively, and paid taxes on the basis of 100% of net income. Timely claims for credit or refund were filed June 18, 1968 and were denied November 1, 1968. Petitions were then filed November 18, 1968, claiming that the taxpayer maintained a regular place of business in Missouri and was entitled to allocate its property and receipts within and without New York State. Refunds were claimed as follows:

	<u>9/30/65</u>	<u>9/30/66</u>
Tax at 100%	\$54,983.77	\$70,640.46
Taxpayer's computation	46,501.00	59,616.00
Refund claimed	\$ 8,482.77	\$11,024.46

A preliminary hearing was held in Albany on December 16, 1969 before John J. Genevich. The taxpayer was represented by Irwin Klepper, Assistant Treasurer of Becton, Dickinson & Co., successor to Clay-Adams, Inc., Charles E. Quinby, Jr., Manager of Accounting, and Arthur Wittenstein, Counsel, Stroock & Stroock & Lavan.

Mr. Klepper testified at the hearing (Page 4 of the Hearing Report) that the taxpayer made an agreement with Mr. Vaughan Morrill under which Mr. Morrill operated a manufacturing plant exclusively for the taxpayer under the name of Morrill Engineering Co. Mr. Morrill was not an employee of the taxpayer, but received a consulting fee of \$25,000 per year. Each month Morrill Engineering Co. notified the taxpayer what its estimated expenditures would be for the subsequent month and received advance payment of that amount (Page 5). Each year a public accounting firm audited the books of Morrill Engineering Co. and notified the taxpayer of the type and amount of expenditures and the amount to be added to the inventory of Clay-Adams, Inc. (Page 9).

The property allocation schedules on the returns for the years ended September 30, 1965 and 1966 reflected property of the taxpayer outside the state in the amounts of \$25,000 and \$61,000, respectively. Mr. Klepper testified that such property consisted principally of machinery and equipment at the premises of Morrill Engineering Co. (Page 4 of the Hearing Report).

Although not reflected in the receipts allocation schedule, Morrill Engineering Co. made shipments direct to customers of the taxpayer, notifying the taxpayer, who then mailed an invoice to the customer. (Page 6 of the Hearing Report and copies of invoices submitted).

Based on all of the information submitted, we believe that the factory operated under the name of Morrill Engineering Co. qualified as a regular place of business of the taxpayer; that the taxpayer paid for raw materials used by Morrill in manufacturing products for it and that Morrill shipped finished goods both to the taxpayer and to the taxpayer's customers. There were no sales from Morrill to the taxpayer because taxpayer was at all times the owner of all inventories.

Accordingly, we recommend that the taxes be recomputed as follows:

	<u>9/30/65</u>	<u>9/30/66</u>
Entire net income	\$999,705.00	\$1,284,372.00
Business allocation %	84.573%	84.394%
Allocated net income	845,478.00	1,083,932.00
Tax at 5½%	46,501.00	59,616.00
Tax paid	54,983.77	70,640.46
Reduction	\$ 8,482.77	\$ 11,024.46

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Principal Corporation Tax Examiner

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Principal Corporation Tax Examiner

EJS:MB  
1/23/70

Approved E. A. Doran  
Milton Koerner - 1/26/70  
A. B. Manley - 1/28/70